



June 18, 2024

HAVE YOU TAKEN ANY SHORTCUTS IN YOUR DOCUMENTATION THAT COULD SPELL TROUBLE?

On June 4, the Consumer Financial Protection Bureau (“CFPB”) issued Circular 2024-03 regarding unlawful and unenforceable contract terms and conditions. The CFPB asserted that covered persons and service providers can violate the Consumer Financial Protection Act’s (“CFPA”) prohibition on deceptive acts and practices by including various terms that, among other things, (i) purport to waive or otherwise limit consumer rights or (ii) hide or misrepresent the terms applicable to consumers by using vague language to qualify language with broad disclaimers such as “subject to applicable law,” leaving the impression that an inapplicable or otherwise unenforceable provision could actually apply to a particular consumer.

The CFPB notes that many federal and state laws render various contract terms unlawful or unenforceable in certain contexts (such as potential limitations on consumer reviews; see CFPB Bulletin 2022-05). The CFPB provided a variety of examples under the Truth-in-Lending Act, Electronic Fund Transfer Act, Military Lending Act and Servicemember Civil Relief Act, noting that the Federal Trade Commission also administers a number of laws that forbid various contractual provisions and waivers.

The CFPB identifies specific examples of problematic provisions, noting that consumers are unlikely to be aware of laws that render various terms and conditions unlawful or unenforceable. The CFPB specifically criticized the use of disclaimer such as “subject to applicable law,” because consumers may presume that unenforceable provisions may apply to them. The counter to such use is to identify the specific application of term (which may vary state by state) or clearly identifying provisions that are or may be inapplicable to consumers. New Jersey requires a specific consumer disclosure with regard to New Jersey residents to the latter effect.

State laws too include a variety of limitations on consumer transactions and contracts, such as specific prohibitions on contractual provisions that provide for waivers of consumer legal rights and limitations on fees.

The decision to use disclaimers should be carefully made with an understanding of state-by-state requirements and program

operation. Laws can change over time. Some use of qualifiers may be deemed unavoidable in some multistate contracts despite a general desire to be clear and specific.

With decades of experience and a wealth of multistate data on a 50-state basis, we can assist with such analysis.

✦ *Mike Tomkies, Elizabeth Anstaett and Mercedes Ramsey*

LOOKING FOR COMPLIANCE RESOURCES? We publish easy-to-use subscription references, our various DIGESTS, that compile the state and federal laws governing open-end lending via credit cards, debt collection, financial privacy, fair credit reporting, telemarketing, automatic dialing and announcing devices, telephone monitoring and recording, electronic signatures and restrictions on the use of social security numbers by financial service providers. We also offer a host of other compilations on a variety of topics, for consumer and commercial lending, for open-end and closed-end credit, and more. Creditors, marketers, servicers and collectors should find these resources invaluable for program development and maintenance. **Contact us for details.**

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